Office - Supreme Court, U.
FILED
MAY 11 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 886.

LUCILLE H. BURCH,
Petitioner,

v.

READING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
BARBARA ANN DUFFY,
RICHTER, LORD & LEVY,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pa.

International, 236 Chestnut St., Phila. 6, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 886.

LUCILLE H. BURCH,

Petitioner,

v.

READING COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

This Brief is submitted in reply to Respondent's Brief in opposition to Petition for Writ of Certiorari.

ARGUMENT.

Introduction.

Upon examination, Respondent's argument [1] fails completely to apprise this Court of a single reason why the Writ should be denied. It claims that the decision of the Court of Appeals ". . . is not in conflict with any of the decisions cited in the Petition . . . ", and yet the Petition points squarely to genuine conflict between (1) decisions in this Court and the decision below as well as between (2) decisions in seven Courts of Appeals, State Courts of last resort and the decision below. Respondent has made utterly no effort to explain what it says is harmony in areas where in truth there is real and substantial conflict and critical disruption of settled rules

1. Respondent's Brief, p. 6.

of law. The hard truth of the matter is that Respondent never comes to grips with the cases cited in the Petition. Yet those cases are authoritative in all the areas involved here.

The Petition accurately cites and discusses fifty cases, only one of which even appears in Respondent's Brief. Surely Respondent's naked conclusion that there is no conflict should be demonstrable through some more rational and convincing method than its simply saying there is no conflict. We have advised the Court of the controlling cases. Respondent had them before it, and yet in not a single instance in its entire Brief has it gainsaid the argument we propounded from those holdings. If consonance did in fact exist as between the decision below and other controlling law Respondent had ample opportunity to demonstrate it to the Court. Respondent did not, and we are confident it could not. Its failure in this respect underscores the urgent need for the granting of the Writ. Each of the errors below and the conflicts created by them is a potential Pandora's box of additional litigation and appeals in most F. E. L. A. cases and in great areas of general civil litigation.

I.

Respondent dealt with the question of exclusion of evidence regarding the negligent direction or *permission* of petitioner to work beyond her capacity by simply refusing to acknowledge the reasons stated by the trial judge for that exclusion: the "conflicing inferences" that might be drawn therefrom (386a). The courts below at least recognized the probative significance of the evidence, but were in serious error in taking it from the jury when it could only be for the jury.[2] The point, of course, is lost completely by Respondent when it urges its spurious no-evidence theory. This is not the basis on which the evidence was excluded. Respondent thus goes much beyond

2. Lavender v. Kurn, 327 U. S. 645, 66 St. Ct. 740 (1946).

the error of the courts below in attempting to deny the significance of proof which those courts admit: that it was proof susceptible of conflicting inferences.

II.

The argument advanced at page 12 of Respondent's Brief in regard to the duty of antecedent inspection is a totally confused and inaccurate statement of the employer's duty under the F. E. L. A. Its distortion is dramatic corroboration of our position that a clear statement of the law on the point is urgently needed. It is a confusion created by mixing concepts of reasonable inspection and reasonable repair with the absolute duty on the employer to furnish a reasonably safe place to work. It falls into the embarrassing error of the courts below: of positing the carrier's failure to furnish a safe place to work and then withdrawing liability by stating that what is by definition negligence is not necessarily negligence because the employer may not have had enough time to make the inspection and correct the unsafe place *after* the employee's arrival on the scene. The reasonable inspection and the reasonable repair are the acts which must be performed by the employer in prosecution of its absolute antecedent duty to furnish a reasonably safe place to work. The negligence is the failure to furnish or to provide the employee with the safe place at the outset.[3] The law must, in logic and in fact, mean this and only this. This Court should now make that clear and resolve any further confusion on this most vital problem which is part of many if not most F. E. L. A. cases.

Note that the effect of the decision below is nothing less than a ruling by the trial court that, as a matter of law, the employer may direct his employee to suffer any kind of condition of employment, and is liable only if *thereafter* he fails to discover and correct the dangerous condition, however patent it may be. This is clearly contrary to

3. This explicitly requires reasonable inspection of the place where the employee is to work *before* he starts to work at that point.

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413 (1949) and is a bland reliance on *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 S. Ct. 635 (1914) which *Wilkerson* declared no longer to be the law. 336 U. S. 69, 69 S. Ct. 421 (1949).

Respondent's error here also infects its discussion of the third point involving the problem of unavoidable accident as is manifest in its confounding of the rationale in Judge Kalodner's dissent at Page 13 of its Brief.

III.

Respondent treats the point involving the burden of proof by, in effect, saying we did not give the charge a fair reading. In that connection we merely ask this Court to read Judge Kalodner's dissent below. It is no defense of the error below to avoid its existence by pointing only to those portions of the charge which do not contain the error. The fact is that the burden of proof appropriate in a criminal case should under no circumstances appear in an F. E. L. A. jury charge whether it be by fleeting reference (which it certainly was not here) or repeated restatement (which it certainly was here).

IV.

Respondent's treatment of the final point involving the unnamed, unproven widowed and orphaned stockholders is a brazen affront to the spirit and letter of the F. E. L. A. It says that trial courts should:

> ". . . place the parties on equal terms in the eyes of the jury by a graphic example which, in effect, points out that while the plaintiff is an individual who may need money, a defendant corporation is actually made up of individuals who may also need money and therefore that the jury's consideration should not be based upon which party has or needs the money, but solely upon the facts relating to liability and damages."[4]

4. Respondent's Brief, p. 18.

The rampant mischief of this view and the error below is patent: (1) this material is *de hors* the record; (2) it is irrelevant; (3) even if *pro arguendo* "neutralizing" were a valid concept, this is not neutralizing. The whole system of public utility economics with its concept of a fair return through rate-making relief available to carriers belies the notion that the needy railroad investor stands in the same status as the injured railroad employee, and that the plight of the investor "neutralizes" the plight of the injured employee. The injured railroad employee has been given a remedy for his physical and economic condition by a solemn act of Congress: the F. E. L. A. The railroad investor, if injured economically, has his remedy completely distinct from the F. E. L. A. There is no justifiable reason, and none was advanced either by the courts below or Respondent, as to why those remedies should be confounded as the trial judge did in his jury charge. We can only wonder what the reaction in the courts below would have been in a turnabout which is conceptually as valid as the "neutralization" attempted here: if in a rate-making litigation an adjudicating body had "neutralized" the appeal of proven widowed and orphaned railroad investors by injecting into its consideration the pressing needs of unnamed, unproven injured carrier employees.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

B. Nathaniel Richter,
Seymour I. Toll,
Barbara Ann Duffy,
Richter, Lord & Levy,
Attorneys for Petitioner.